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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
The Honorable SALVADOR J. MENDOZA, JR.

United States of America,

Case No. 19-cr-2032-SAB

Plaintiff,

V.

James D. Cloud,

**Post-Hearing Brief in Support of Mr.  
Cloud's Motion to Exclude or Limit  
Firearms Identification Evidence**

Defendant.

That testimony as to a forensic practice has been previously accepted in courtrooms in no way makes it reliable, and does not make it admissible now. We have seen this before with respect to other disciplines, some of which were largely accepted and deemed admissible for years, if not decades. But things change. Science sharpens. The relevant community awakens. Testing reveals serious flaws and shortcomings. Lawyers and judges become more astute, more comfortable with new, technical areas, and more learned. And less intimated by a user community that hides behind its purported expertise. The paradigm shifts. What was previously admissible, even for long periods of time, now gets consigned to the shelf, at least for purposes of in-court use. It has happened to numerous other forensic disciplines, and it is happening now with respect to firearms identification. It is no James Cloud's Post-Hearing Brief in Support of Motion to Exclude or Limit Firearms Identification Evidence

1 exaggeration to say that there is a growing chorus among federal and state courts, with more  
2 and more extensive limitations on firearms identification testimony, discussed in detail in  
3 Mr. Cloud's opening brief, and outlined on page 21 therein. We ask this Court to join them.

4       The defendant, James Cloud, respectfully submits this memorandum in further  
5 support of his motion [ECF Document No. 325] to exclude and/or, in the alternative, to  
6 limit firearms/toolmark identification evidence. For the reasons advanced in the prior  
7 submissions and adduced at the evidentiary hearing in October 2021, the government has  
8 not carried its burden of demonstrating the reliability of the type of firearms individualized  
9 source attribution testimony it seeks to introduce through the testimony of Michael Van  
10 Arsdale. The evidence at the hearing simply underscored its *lack* of foundational validity,  
11 and highlighted the lack of sufficient testing. If anything, studies to date, culminating with  
12 the recent Ames-FBI study released one year ago, provide reason to doubt rather than  
13 confirm the reliability of firearms identification testimony. Accordingly, pursuant to the  
14 Court's post-*Daubert* gatekeeping function to keep out such evidence, it should grant the  
15 motion in its entirety, or in large part.

17       **II. Testimony at the Hearing**

18       At bottom, and whatever else was shown at the hearing, it demonstrated that firearms  
19 identification, as practiced through the AFTE theory of identification, remains a highly  
20 subjective, extra-scientific practice that relies almost exclusively on an examiner's training  
21 and experience. Tr. at 121-22, 147, 261-66. In addition, it relies on vague, ambiguous  
22 terminology and circular, tautological reasoning. *Id.* at 268. Mr. Van Arsdale struggled in  
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articulating the “sufficient agreement” standard in anything close to objective, reproducible terms. Tr. at 122-29. This is because there effectively is no standard, and the definition is circular. Sufficient agreement exists when the examiner feels that the questioned markings pass beyond known disagreement. ECF Document No. 325, at 16 n. 10. In other words, markings can be said to agree when they do not disagree, or when the examiner feels there is not enough evidence of disagreement. Tr. at 267-68. Def. Ex. 1005, at 36, 40.

From a scientific standard, as this is what firearms identification purports to be, this is terribly deficient and leaves the practice with no reliable and reproducible standards. When we pass beyond observable, somewhat obvious and objective class characteristics, we leave those yardsticks behind entirely and the practice is 100% subjective in nature. Exhibit D [attached to ECF Document No. 325, hereinafter “Exhibit D”], at 17, 20, 53. This is why Mr. Tobin and others call such claims *ipse dixit* in nature; it is simply assumed or presumed and remains entirely unproven scientifically. Tr. at 262; Exhibit D, at 21, 48; *see also General Elec. Co. v. Joiner*, 536 U.S. 136, 146 (1997). Even if most forensic disciplines contain *some* level of subjectivity, firearms identification relies on an impermissible amount of subjectivity, which almost subsumes the practice. Tr. at 356-58, 377-78. This distinguishes it from other disciplines (DNA, for example) that do not pose the same issues with respect to reliability or foundational validity, and admissibility in Court. Tr. at 356-58, 377-78. And whatever place that training and experience has in the reliability of an expert’s opinion, it cannot substitute for objective protocols, from a scientific basis. Tr. at 296-97. The PCAST Report

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1 underscored a firearms examiner's over-reliance on training and experience, as well as the  
2 inherent shortcomings in such subjective practices. Def. Ex. 1006, at 60-61.

3 From a more technical standpoint, Mr. Tobin testified as how the key premises on  
4 which firearms identification relies – uniqueness, discernible uniqueness, and repeatability –  
5 are simply assumptions or presumptions, and unproven. Tr. at 217-19, 222-24 239-42; Def.  
6 Ex. 1005, at 25-26, 31-34. Mr. Van Arsdale agreed that individualization or uniqueness has  
7 never been proven, cannot be tested, that no study has validated individualization, and that  
8 establishing individualization or uniqueness cannot be done by study. Tr. at 132-37. Van  
9 Arsdale was similarly unable to articulate any scientific principles that govern the concept of  
10 individualization. Tr. at 136-37. Further, that uniqueness that it has never been *disproven*  
11 [Govt. Ex. 6, at 42] or falsified is irrelevant and of no moment from a scientific or logical  
12 (*argumentum ad ignorantiam*) basis. Tr. at 375-76. Even if firearms identification has not been  
13 “disproven” by skeptics (an odd metric given that in courts, its proponents are the ones who  
14 have the burden of demonstrating its reliability), that does not indicate suggest any validity to  
15 the practice. Tr. at 375-76. Part of the problem from a reliability standpoint is precisely that  
16 the AFTE theory of identification *cannot* be falsified as a hypothesis. Tr. at 251-56, 375-76.

17 Further, as to discernible uniqueness, and whether or not markings are random and  
18 individualized, the more critical question is whether examiners are capable of observing  
19 characteristics and discerning what is random and what is subclass, and the answer is no.  
20 Def. Ex. 1006, at 64. This practice remains without foundational validity, and there is no  
21 method to reliably discern sub class characteristics from more random, individual ones. *Id.*;  
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1 Tr. at 227, 319-20. AFTE theory is further flawed because it relies on what Mr. Tobin calls  
2 an “irrational dichotomy” - that markings of the same tools are persistent and stable over  
3 time (in other words, not changing as the firearm is discharged over potentially long periods  
4 of time), but that they are changing at the production or manufacturing level with each  
5 individual new tool produced so as to permit identification of unique or individual markings.

6 Tr. at 270-71, Def. Ex 1005, at 35.

7 DOJ attempts to paper over these problems by limiting what examiners can say in  
8 documents like the ULTRs, with prohibitions on using terminology like individualization  
9 and uniqueness. Tr. at 132-36, 187-90, 298-300. It thus eschews language and source  
10 conclusions “to the exclusion of all others” or “to a reasonable degree of ballistic certainty.”  
11 Tr. at 189-90. But an identification or source attribution like Mr. Van Arsdale’s is effectively  
12 the same thing as a finding of individualization or uniqueness. The ULTRs are thus little  
13 more than a band-aid for a more festering problem. They are designed to provide a patina  
14 of reliability by removing some of the most problematic, objectionable language. However,  
15 this assumes the validity of what it permits for inclusion. Trimming fat does not mean that  
16 what remains is muscle. And, partially because examiners and other DOJ personnel lack  
17 expertise in fields like statistics, science and probability, they are unable to see that opining  
18 an identification or source attribution is essentially the same in substance as what they are  
19 not permitted to say.

20 Both witnesses at the hearing agreed on the need to understand manufacturing  
21 processes and the metallurgical principles behind them. Tr. at 114-15, 143-45, 149-52. An  
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1 examiner needs to understand the origin of the markings as an aspect of his/her  
2 identification, and how to distinguish individual from subclass characteristics. Tr. at 144,  
3 152. Mr. Van Arsdale admitted that markings on bullets or casings may be quite similar  
4 when fired from different firearms, and how this reflects the need to recognize subclass  
5 characteristics imparted during manufacturing. Tr. at 138-39. And that sometimes, there is  
6 disagreement in markings from even the same firearm. Tr. at 139-40. Mr. Tobin's  
7 testimony [Tr. at 226; Def. Ex. 1005, at 22] too indicates that markings on ammunition  
8 components fired from different firearms can appear virtually identical or indistinguishable.  
9 Yet familiarity with the relevant manufacturing processes was hardly established during Van  
10 Arsdale's testimony. He did not and could not look at the entire production lot or other  
11 samples from it. Tr. at 153-54. Subclass characteristics can persist across multiple  
12 production lots. Tr. at 155. He did not appear to know about a geographic component, as  
13 to whether firearms or tools from the same production lot are concentrated in any given  
14 area. Tr. at 154. Because of the real and evident risk in confusing subclass for individual  
15 characteristics, it is critical for a firearms examiner to understand, be familiar with and aware  
16 of manufacturing processes of the tools involved. Tr. at 227. More than that, it also  
17 requires knowledge of the production lot, which Mr. Tobin defined as "all of the  
18 components that were fabricated or manufactured by a particular tool or die." Tr. at 229.  
19 This is because subclass characteristics are likely transferred to most, if not all components  
20 that are part of the same production lot. Tr. at 230. Absent this type of rigor, it is difficult  
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22  
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1 to have any confidence in the reliability of his purported identification. Tr. at 226-30; *see also*  
2 Def. Ex. D, sub-parts D &G.

3 For these and many other reasons, firearms identification, to the level of a source  
4 attribution, is not generally accepted in the relevant scientific community, include the NAS  
5 and PCAST. Tr. at 321; Def. Ex. 1005, 1006, 1007. That it is generally accepted in the *user*  
6 or practitioner community by other AFTE adherents<sup>1</sup> [Govt Ex. 6, at 31], is, again, of no  
7 moment in the *Daubert* analysis, for largely the same reasons advanced in Mr. Cloud's earlier  
8 briefing.

9  
10 Mr. Tobin also outlined a number of problems in AFTE's peer review process, both  
11 historically, and currently, to include that it relies on a selected, insular community, is not  
12 truly blinded, is not or has not been made available more broadly to the general scientific  
13 community, and is reviewed seemingly only by others who subscribe to the AFTE theory of  
14 identification. Tr. at 302-07. Particularly when contrasted with true or legitimate refereeing  
15 in the scientific community for academic or scientific articles, the peer review practice here is  
16 highly limited and does not promote or confer reliability in any sense. Tr. at 309.  
17  
18  
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21  
22 <sup>1</sup> Moreover, that it achieves foundational validity or reliability because it is a subject of university  
23 course offerings is simply false. Govt. Ex. 1006, at 31; Tr. at 261-262. Likewise, lab accreditation [Govt.  
24 Ex. 6, at 32], which has to do more with administrative or logistical protocols like chain of custody, does  
not validate the theory either. Tr. at 347.

1           **III. Validation Testing Confirms a Lack of Reliability**

2           The lack of standards, and the degree of subjectivity and reliance on training and  
3 experience sharpens the need for validation studies to test the relevant propositions. And  
4 here too, firearms identification falls well short of the mark. On the whole, the relevant  
5 studies are “grossly unacceptable scientific empirical research.” Tr. at 365. Mr. Tobin  
6 testified that “there is not a single study that -- that purports to validate the practice that is,  
7 in fact, valid. It does not do what practitioners present to courts or claim to courts that it  
8 does. So, in other words, there's not a single “validation” study out there that is meaningful  
9 for judicial application.” Tr. at 241. Mr. Tobin outlined some of the myriad flaws for  
10 “validation” studies – too numerous to include within the limited confines of this brief. Tr.  
11 at 242-45, 252-53, 277-788, 290; Def. Ex. 1005, at 65; *see also* id. at 43, 50-54, 60-64, 69, 73.  
12 The PCAST Report similarly summarized many of the flaws in testing, including a study  
13 from Mr. Van Arsdale himself. Tr. at 295, Def. Ex. 1005, at 63. Moreover, even Mr. Van  
14 Arsdale appeared to either agree with defense counsel about many of these flaws among the  
15 five studies the government hand-picked for presentation at the hearing. Tr. at 166-86.  
16 Alternatively, Mr. Van Arsdale was unaware of the underlying information or defect, but did  
17 not appear to suggest that such flaws did not exist or were not problematic. *Id.*  
18

19           At the most fundamental level, the validation studies are critically flawed because  
20 what they purport to measure does not replicate casework, in large part because they rely on  
21 deductive reasoning, as opposed to the inductive regime in actual casework. Tr. at 164, 273-  
22 75; Def. Ex. 1005, at 54. Because of this and other shortcomings, the studies contain very  
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1 little (if any) external validity, that is, generalization from the specific conclusions of the  
2 studies themselves to the practice of firearms identification at large. Tr. at 277-78; Def. Ex.  
3 1005, at 64. When asked as to studies that replicate casework according to a scientifically  
4 valid or acceptable methodology, Mr. Van Arsdale testified that he has “not seen a study yet  
5 that has been designed to do this.” Tr. at 393-94. Most studies are not black-box in design,  
6 which renders them significantly flawed as it relates to a subjective practice like firearms  
7 identification. Tr. at 282-84; Def. Ex. 1006, at 5, 9, 11-12, 46. Moreover, nothing about  
8 using consecutive manufactured firearms in studies<sup>2</sup> can account for the myriad flaws in the  
9 validation studies, or, more fundamentally for the unproven premises underlying AFTE’s  
10 theory of identification. Tr. at 295-96.

12 The government conflates the timing of post-PCAST studies as a sufficient indicator  
13 of a reliable testing design, when the reality is that the more recent studies can be just as  
14 flawed as the pre-PCAST ones, whether or not the administrators attempted to address  
15 them or not. Tr. at 362, 378. Attempting to address PCAST’s criticism does not correlate to  
16 success in that endeavor. *Id.* And perhaps more important, especially for the more Ames-  
17 FBI study, the results were hardly reflective of a reliable practice, either in terms of accuracy  
18 (including false positives and inconclusives), repeatability or reproducibility. Tr. at 247-48,

21 \_\_\_\_\_  
22  
23 <sup>2</sup> This would even assume that firearms with sequential serial numbers were in fact consecutively  
24 manufactured, a premise that Mr. Tobin largely debunks in the first instance. Tr. at 353, 374.  
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1 259, 284-88; Def. Ex. 1005, at 73; Def. Ex. D, at 55-58. Indeed, that would be a significant  
2 understatement – the results suggest a highly unreliable practice.

3       Each study in Slide 36 of Govt. Ex. 6 is highly flawed, with little to no external  
4 validity beyond the study itself (if it has any internal validity to begin with). Even the study  
5 that PCAST criticized the least, the 2014 Ames/Baldwin study [Exhibit E to ECF  
6 Document No. 325], remains highly flawed. For one, it involved newly purchased firearms  
7 rather than those that had been in circulation for some time, and there was no indication  
8 they were consecutively manufactured. It involved only one brand, and cartridge casings  
9 only, and all firings were performed close in time to one another. The study was not  
10 blinded, involved volunteer participants, has not been published or peer reviewed, and the  
11 participants were not monitored as to collaborative efforts or the extent or consistency to  
12 which the participants applied AFTE guidelines. Even its “black box” status is in dispute, as  
13 is the ability of the examiner in the study to use dissimilarities to make eliminations (similar  
14 to the closed-set deductions that PCAST criticized). Even so, nearly a quarter of  
15 participants (66 of 284) dropped out, and the number of inconclusives measured about a  
16 third of responses, and the error rate appeared far higher than other studies, including the  
17 ones discussed during the government’s examination of Mr. Van Arsdale. When *this* is  
18 supposed to be gold standard, the practice is seriously flawed from a reliability standpoint.  
19

20       The actual error rate for firearms identification is unknown, as Mr. Van Arsdale  
21 acknowledged. With regard to error rates in testing, the validation studies simply beg the  
22 question of what is being tested and how? And how much does it resemble what examiners  
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1 purport to do in the real world for actual casework? Especially for studies that produce a  
2 purported error rate of zero or approaching zero, these are suspect given that the error rate  
3 in casework is assuredly higher. If the error rate is zero, there would be no need to institute  
4 the verification or review procedures<sup>3</sup> the FBI has, however imperfect they are. Further,  
5 how they arrive at the purported error rate is often anything but clear, and seems more the  
6 product of misrepresenting errors and how they are calculated than with the validity of the  
7 practice itself. This is most apparent in the 2020 Smith study in the government's  
8 presentation.

With regard to the treatment of “inconclusives,” Mr. Cloud continues to believe that those like Mr. Tobin, and Professors Dror and Scurich [Exhibit I, at 336-37 attached to ECF Document No. 325], have the better of the argument that they should not be excluded from the error rate. Where ground truth is known, the administrators know whether a response is correct or incorrect, and the consensus in the scientific community is that inconclusive responses should count towards an error rate. Tr. at 288, 311. Further, when an examiner knows that he is being tested, i.e. because the study is not properly blinded, there is evidence that the rates of inconclusives rise significantly. Tr. at 278, 281, Exhibit I, at 336.

<sup>3</sup> On the subject of the FBI's verification or review procedures, the reviewer is also applying the same flawed AFTE theory of identification. Tr. at 158-59. In addition, they are more likely to be looking at identifications because they are far less obvious than eliminations, and they do not review all exclusions. Tr. at 159-60. Mr. Van Arsdale testified that “[t]he verification process utilized in most verifications is not necessarily blind.” Tr. at 160. In many instances, the (initial) examiner is anything but removed from the verification or review process.

1       Of course, deciding which questions to answer or to provide a conclusive answer for  
2 will increase the purported success rate for the conclusions or answers provided. Discarding  
3 the hardest calls increases the ease with which a test subject provides an identification or  
4 exclusion. Thus, the claims of 99% correctness in validation studies should be assessed in  
5 the context in which such answers were provided, where examiners chose when to provide  
6 one, or chose to provide answers to the questions for which they were most confident.  
7

8       Mr. Van Arsdale's analogy [Tr. at 196-97] is flawed, because the very premise for both  
9 testing and casework is that examiners should be able to do what they purport to do, not be  
10 stymied. Even when the testing is designed to be more difficult, it is not designed for the  
11 purpose of preventing an identification or exclusion. At a fundamental level, when a match  
12 is not identified as a match, or when an elimination is not identified as an elimination, those  
13 responses are objectively wrong. And the whole point of the studies is that the ground truth  
14 is known; simply ignoring an inconclusive response is thus incongruent with what the test  
15 administrators are trying to measure. Inconclusive responses are acceptable in casework to  
16 avoid speculation, but not in studies where the ground truth is known, and responses are  
17 either right or wrong.

18       **IV. Lack of Testimony and Evidence that AFTE Methodology was Reliably**  
**Applied in this Case Requires Excluding Mr. Van Arsdale's Testimony**

20       Even if the Court were to find that the AFTE's theory of identification is the product  
21 of reliable methods, the government has not shown, by any standards, that it was reliably  
22 applied *in this case*. This requirement is no mere formality; it is a foundational condition

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1 precedent expressly baked into Rule 702. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745  
2 (3d Cir. 1994) (“[A]ny step that renders the analysis unreliable [] renders the expert’s  
3 testimony inadmissible. This is true whether the step completely changes a reliable  
4 methodology or merely misapplies that methodology.”). The Court cannot find that it has  
5 satisfied here upon the government’s scant showing, expressly, by inference, implicitly, or  
6 otherwise.

7       This foundational prong of Rule 702 becomes even more critical in the realm of  
8 testimony that, like firearms/toolmark identification, relies in such large part on subjective  
9 analysis, without recognized standards and so dependent on individual training and  
10 experience. *See Fed. R. Evid. 702, adv. comm. notes* (“If the witness is relying solely or  
11 primarily on experience, then the witness must explain how that experience leads to the  
12 conclusion reached, why that experience is a sufficient basis for the opinion, and how that  
13 experience is reliably applied to the facts. The trial court’s gatekeeping function requires  
14 more than simply “taking the expert’s word for it.”) (citing *Daubert II*, 43 F.3d at 1319). This  
15 is what the Supreme Court in *Joiner* also warned against, noting that courts should reject  
16 expert testimony where “there is simply too great an analytical gap between the data and the  
17 opinion proffered.” 536 U.S. at 146. Where only *ipse dixit* statements make that connection  
18 or permit a conclusion that the methods were reliably applied in this case, the testimony  
19 should be inadmissible at trial.

21       The government’s direct examination of Mr. Van Arsdale, across their many slides,  
22 did not contain any questions or answers about what Mr. Van Arsdale did in this case, that  
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1 is, whether the methods and principles a firearms examiner generally employs, were reliably  
2 applied in this case to reach the conclusions Mr. Van Arsdale appears to draw in  
3 Government Exhibit 8. It was almost as if Mr. Van Arsdale was brought in to speak about  
4 AFTE methodology generally, without having played any role in this case. Nor did the  
5 government save such testimony for its rebuttal; there, Mr. Van Arsdale and the prosecutor  
6 focused on Mr. Tobin's slides and testimony, without any reference to what Mr. Van Arsdale  
7 did in this case. Tr. at 382-90.

8 Accordingly, the government cannot demonstrate the foundational requirements to  
9 admit Mr. Van Arsdale's purported conclusions, because it only tried to show half of what it  
10 would have needed to demonstrate. To put it more bluntly, without knowing what the  
11 expert did in this case, and the conclusions he reached (let alone whether they were reliably  
12 applied), the testimony is simply not relevant under Rule 401.

14 **Conclusion**

15 For the foregoing reasons, and those in prior briefing and expressed at the hearing,  
16 the Court should grant the motion and exclude Mr. Van Arsdale's testimony at trial. If not,  
17 it should limit his testimony to Mr. Tobin's formulation that the "only scientifically and  
18 forensically defensible position" for a firearms examiner to opine about, is that in his/her  
19 opinion, "a specific firearm could not be eliminated as the firing platform." Tr. at 301. But  
20 it should exclude it altogether rather than limit it, because that is the only way to truly  
21 protect Mr. Cloud from unfair prejudice given the diminished, minimal probative value as to  
22 an expressed inability to eliminate a particular firearm from being the one that fired  
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cartridges in question. *Cf. Tibbs*, 2019 D.C. Super. LEXIS 9, at \*80-81 (“Any statements by the expert involving more certainty regarding the relationship between a casing and a firearm would stray into territory not presently supported by reliable principles and methodology.”).  
Jurors would be apt to confuse and make unwarranted inferences from testimony that cartridge casings appeared “consistent” with those known to be fired from the Ruger Rifle at issue, or even that the Ruger could not be eliminated as having fired the rounds in question.

The danger is too high that jurors would conclude through the back door what the government would not be permitted to introduce through the front, leading to the same unacceptable, unreliable result. *See Garrett, Scurich & Crozier, Mock Jurors’ Evaluation of Firearms Examiner Testimony*, 44 Law & Human Behavior 412, 422 (2020) (suggesting “that many judicial and prosecution-driven interventions to limit conclusion language for firearms testimony are not likely to be effective” because laypeople place great weight on firearms testimony”). In other words, efforts to limit the conclusions expressed by firearms examiners still appear just as likely to lead to guilty verdicts, but with the exception of inability to eliminate language similar to that used in *Tibbs* and Mr. Tobin’s formulation above. *See id.* And as Mr. Tobin testified, jurors are more apt to defer to matters they believe are scientific than, for example, to similarly accept evidence or testimony that is non-scientific. Tr. at 301. Because firearms identification has not been shown to be a reliable practice, and absent evidence that it was reliably applied here, the government has not met its burden. Under the reliability criteria in *Daubert* and elsewhere, and under Fed. R. Evid. 702, the motion should be granted.

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1  
2 Dated: October 29, 2021  
3

Respectfully Submitted,

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10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on October 29, 2021, I electronically filed the foregoing with  
12 the Clerk of the Court using the CM/ECF System which will send notification of such  
13 filing to the following: THOMAS J. HANLON, RICHARD C. BURSON, Assistant  
14 United States Attorneys.

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